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B-330190

December 19, 2018

The Honorable Edward Markey  
United States Senate

Subject: *U.S. Department of Justice – Applicability of the Congressional Review Act to the Attorney General's April 2018 Memorandum*

Dear Mr. Markey:

This is in response to your request for our opinion regarding whether the zero-tolerance policy outlined in a memorandum issued by the Attorney General on April 6, 2018, is a rule for purposes of the Congressional Review Act (CRA). DOJ, Office of the Attorney General, Memorandum to Federal Prosecutors along the Southwest Border, *Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a)* (Apr. 6, 2018) (hereinafter the April 2018 memorandum). The April 2018 memorandum directs each U.S. Attorney's Office along the southwest border, to the extent practicable and in consultation with the Department of Homeland Security (DHS), to adopt immediately a zero-tolerance policy for all offenses referred for prosecution under 8 U.S.C. § 1325(a). As explained below, we conclude that the April 2018 memorandum is not subject to review under CRA because it is a rule of "agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties." 5 U.S.C. § 804(3)(C). Rather, the rights and obligations in question are prescribed by existing immigration laws and remain unchanged by the agency's internal enforcement procedures at issue here.

We received your request concerning the April 2018 memorandum on June 19, 2018. Letter from Senator Edward Markey to Comptroller General (June 19, 2018). You also asked us to review a memorandum sent from various DHS components to the Secretary of Homeland Security dated April 23, 2018. *Id.* This memorandum proposed a plan for the Secretary to approve that would carry out the zero-tolerance policy. Because the memorandum was only a proposal with recommendations and not a final agency action, this opinion focuses on the final agency action in the April 2018 memorandum.

Our practice when rendering opinions is to contact the relevant agencies and obtain their legal views on the subject of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006),

available at [www.gao.gov/products/GAO-06-1064SP](http://www.gao.gov/products/GAO-06-1064SP). We contacted the Office of Legal Policy to obtain the agency's views. Letter from Managing Associate General Counsel, GAO, to Deputy Assistant Attorney General, Office of Legal Policy, DOJ (July 18, 2018). We received a response on September 10, 2018. Letter from Assistant Attorney General, Office of Legislative Affairs, DOJ, to Managing Associate General Counsel, GAO (Sept. 4, 2018) (DOJ Letter). DOJ stated that the April 2018 memorandum remains in full force. *Id.* at 4.

## BACKGROUND

### The April 2018 Memorandum

On January 25, 2017, the President signed Executive Order 13,767, instructing the Attorney General to "take all appropriate steps to establish prosecution guidelines and allocate appropriate resources to ensure that Federal prosecutors accord a high priority to prosecutions of offenses having a nexus to the southern border." Exec. Order No. 13,767, *Border Security and Immigration Enforcement Improvements*, § 13, 82 Fed. Reg. 8793 (Jan. 30, 2017). Subsequently, on April 11, 2017, the Attorney General issued a memorandum to all federal prosecutors in which he instructed U.S. Attorney Offices to make certain immigration offenses higher priorities with a goal of deterring first-time improper entrants. Department of Justice (DOJ), Office of the Attorney General, Memorandum to All Federal Prosecutors, *Renewed Commitment to Criminal Immigration Enforcement* (Apr. 11, 2017). Among other things, he instructed the U.S. Attorney Offices along the southwest border (i.e., District of Arizona, District of New Mexico, Southern District of California, Southern District of Texas, and Western District of Texas) to work with DHS to develop a set of guidelines for prosecuting misdemeanor violations of 8 U.S.C. § 1325(a). In that regard, 8 U.S.C. § 1325(a) states:

"Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under title 18, United States Code, or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under title 18, United States Code, or imprisoned not more than 2 years, or both."<sup>1</sup>

On April 6, 2018, the President issued a presidential memorandum directing the Secretary of Homeland Security, in consultation with the Secretary of Defense, the Attorney General, and the Secretary of Health and Human Services, to provide a

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<sup>1</sup> The amount of the fines are set forth in 18 U.S.C. § 3571.

report on past and future efforts to enforce Executive Order 13,767. Presidential Memorandum of April 6, 2018, *Ending “Catch and Release” at the Border of the United States and Directing Other Enhancements to Immigration Enforcement*, 83 Fed. Reg. 16,179 (Apr. 13, 2018). Specifically, the presidential memorandum required a report within 45 days detailing all measures their respective departments had pursued or would pursue to expeditiously end “catch and release” practices. Also, on April 6, 2018, the Attorney General issued the April 2018 memorandum, which directed federal prosecutors along the southwest border to adopt the zero-tolerance policy immediately to the extent practicable and in consultation with DHS. The April 2018 memorandum stated that this policy superseded any existing policies.

In accordance with the President’s direction and the April 2018 memorandum, the Secretary of Homeland Security issued a memorandum on May 11, 2018, to the heads of U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection, and U.S. Citizenship and Immigration Services instructing DHS law enforcement officers at the border to refer all illegal border crossers for criminal prosecution to the extent practicable. DHS, Office of the Secretary of Homeland Security, Memorandum to Heads of Immigration Customs Enforcement, Customs and Border Protection, and U.S. Citizenship and Immigration Services, *Referral for Prosecution Under 8 U.S.C. 1325(a), Improper Entry by Alien* (May 11, 2018). This May 2018 memorandum from the Secretary of DHS noted that under previous administrations, for a variety of reasons, many persons who violated 8 U.S.C. § 1325(a) and entered the country illegally were not prosecuted. Instead they were released from custody under “catch and release” policies.

#### The Congressional Review Act

CRA was enacted in 1996 to strengthen congressional oversight of agency rulemaking. Pub. L. No. 104-121, title II, subtitle E, 110 Stat. 857, 868 (Mar. 28, 1996), *codified at 5 U.S.C. §§ 801–808*. The statute requires all federal agencies to submit a report on each new rule to both Houses of Congress and to the Comptroller General before it can take effect. 5 U.S.C. § 801(a)(1)(A). The agency must submit to the Comptroller General a complete copy of the cost-benefit analysis of the rule, if any, and information concerning the agency’s actions relevant to specific procedural rulemaking requirements set forth in various statutes and executive orders governing the regulatory process. *Id.* § 801(a)(1)(B). CRA also provides for expedited procedures under which Congress may pass a joint resolution of disapproval for a rule subject to CRA, that if enacted into law, overturns the rule. *Id.* §§ 801(b), 802.

CRA adopts the definition of a rule under section 551 of the Administrative Procedure Act (APA), which states in relevant part that a rule is “the whole or part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organizations, procedure or practice requirements of an agency.” *Id.* § 804(3). CRA excludes three categories of rules from coverage: (a) rules of “particular applicability”;

(b) rules “relating to agency management or personnel”; and (c) rules of “agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties.” *Id.*

DOJ did not send a report on the April 2018 Memorandum to Congress or to the Comptroller General. In its letter to us, DOJ stated its view that the April 2018 Memorandum is not subject to review under CRA because it falls within the exception for a rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties. DOJ Letter, at 2–3.

## ANALYSIS

To determine whether the April 2018 memorandum is subject to review under CRA, we first address whether it meets the APA definition of a rule, and then, if it does, whether any of the CRA exceptions apply.

We conclude the April 2018 memorandum meets the APA definition of a rule. 5 U.S.C. § 551(4). First, it is an agency statement that announces the implementation of the zero-tolerance policy and that the policy supersedes all existing policies. Second, it is of general applicability, applying to all aliens who cross the border illegally. Finally, the April 2018 memorandum is of future effect, since the policy is to be adopted immediately for cases arising after the date of the April 2018 memorandum.

The next question is whether the April 2018 memorandum falls within any of the exceptions enumerated in the CRA. 5 U.S.C. § 804(3)(A)-(C). Of the three exceptions, we can readily conclude that the first two do not apply in this case. First, the April 2018 memorandum applies to all aliens crossing the southwest border, making it a rule of general and not particular applicability. Second, the April 2018 memorandum does not address DOJ management or personnel. Therefore, the third exception—for rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties—is the only relevant exception here.

The third CRA exception was modeled on the APA, which excludes “rules of agency organization, procedure, or practice” from notice-and-comment rulemaking requirements. 5 U.S.C. § 553(b)(A). See also B-238859, Oct. 23, 2017, at 12. The purpose of the APA exception is to ensure “that agencies retain latitude in organizing their internal operations” and includes, for example, agency procedures governing the conduct of its proceedings. *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980). See also *Public Citizen v. U.S. Department of State*, 276 F.3d 634 (D.C. Cir. 2002). Federal courts have determined that rules were “procedural” under the APA exception when the rules did not have a “substantial impact” on non-agency parties. *Brown Express, Inc. v. United States*, 607 F.2d 695, 702 (5<sup>th</sup> Cir. 1979). This rationale was included in the CRA exception for procedural rules. See B-275178,

July 3, 1997, at 2. We can thus look to APA case law and other relevant cases, as well as our opinions, to guide us in determining whether the memorandum is a procedural rule exempt from CRA requirements.

First, we conclude that the April 2018 memorandum does not alter individual rights; rather, it outlines the agency's internal procedure for addressing violations of 8 U.S.C. § 1325(a). In *United States Department of Labor v. Kast Metals Corp.*, the agency published a memorandum setting forth the revised criteria and method by which it would select employers for routine safety and health inspections. 774 F.2d 1145, 1147 (5<sup>th</sup> Cir. 1984). Kast Metals was selected for an inspection under the new methodology but challenged the memorandum, arguing it was a legislative rule and thus should have first gone through notice and comment. *Id.* On appeal, the court disagreed finding that the memorandum was a procedural rule that did not have a substantial impact on the regulated parties and was therefore exempted from the requirement. *Id.* at 1152. In so finding, the court stated, "The plan's stated purpose was to describe the steps to be followed and the criteria to be applied in selecting workplace establishments for programmed inspection pursuant to the [Occupational Safety and Health] Act. Moreover the plan does not purport or seem to create new law; instead, it contained an OSHA policy of simplified ... scheduling procedures in order to ease the administrative burden." *Id.* (internal quotations and citations omitted). Here, as in the *Kast Metals* case, the April 2018 memorandum lays out the steps DOJ will take to enforce 8 U.S.C. § 1325. Although the memorandum changes previous policy, there is no underlying change in the legal rights of aliens who cross the border.

Second, we have previously concluded that an agency statement falls within this exception where the agency implemented a new internal procedure for ensuring affected parties complied with their existing statutory obligation. B-329916, May 17, 2018, at 7. In B-329916, May 17, 2018, IRS issued a statement that starting with the 2018 tax filing season, the agency would no longer accept electronically filed returns that did not address health care coverage statutory requirements. *Id.* at 2-3. IRS changed the timing of its compliance measures for the 2018 filing season, but it did not change its basis for assessing compliance with existing law—namely, the requirement to file a complete tax return that meets reporting requirements. There, we found the statement met the APA definition of a rule but fell within the third exception because it did not change the legal obligations taxpayers had to obtain and report health insurance. *Id.* at 8.

As in *Kast Metals* and B-329916, the April 2018 memorandum does not change the legal rights or obligations of aliens. The provisions of 8 U.S.C. § 1325 contain both civil and criminal penalties for "entering the United States at a time or place other than as designated by immigration officers." Courts have held on several occasions over many years that an agency's decision not to prosecute a violation of law, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. *Heckler v. Cheney*, 470 U.S. 821, 831 (1985); see also *Welton v. Anderson*, 770 F.3d 670, 674 (7<sup>th</sup> Cir. 2014).

## CONCLUSION

The April 2018 memorandum sets forth DOJ's enforcement policies and practices for violations of 8 U.S.C. § 1325. While the April 2018 memorandum meets the APA definition of a rule, it falls within the CRA exception for a rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties. Rather, the rights and obligations in question are prescribed by existing immigration laws and remain unchanged by the agency's internal enforcement procedures at issue here.

If you have any questions about this opinion, please contact Julia C. Matta, Managing Associate General Counsel, at (202) 512-4023, or Shirley Jones, Assistant General Counsel, at (202) 512-8156.

Sincerely,



Thomas H. Armstrong  
General Counsel